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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of PATRICIA K. and
SCOTT H. WITZMAN.

PATRICIA K. WITZMAN,

Appellant,

v.

SCOTT H. WITZMAN,

Respondent.

D054731

(Super. Ct. No. D477025)

APPEAL from an order of the Superior Court of San Diego County, Edward P. Allard III, Judge. Affirmed.

Patricia K. Witzman (Patricia) appeals an order granting in part a request by her former spouse, Scott H. Witzman (Scott), for modification of a child custody and visitation order.¹ The previous child custody and visitation order, which was a final

¹ We refer to the parties by their first names based upon custom in family law matters. (See *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.) We intend no disrespect.

custody determination, awarded to Patricia and Scott joint legal custody of their minor son and daughter (together the children). It also awarded "primary physical custody" to Patricia and visitation to Scott under a child-sharing schedule. In addition, because of son's severe allergic reactions to cat dander and the fact that Scott's parents had numerous cats in their home, the court prohibited Scott from permitting son to visit Scott's parents or sister. Claiming that Patricia was continuing to alienate the children from him, Scott sought sole physical custody, but not sole legal custody, of the children. The children's attorney submitted a report recommending that Scott and Patricia continue to have joint legal custody of the children and that they also have joint physical custody. It also recommended certain changes to the child-sharing schedule, revisions to the orders governing the children's visitation with their grandparents and aunt, and restrictions on the parents' behavior toward the children.

Following a hearing, the court issued the challenged order, finding that Patricia's continuing behavior in alienating the children from their father was a substantial change in circumstances and adopting the recommendations set forth in the report submitted by the children's attorney.

Patricia appeals the order, contending (1) there is no evidence of a substantial change in circumstances because any lack of progress on her part in altering her behavior was not a change of circumstances, and "[t]here clearly was no change in circumstances with respect to the orders concerning [son's] allergies to cat dander" or with respect to the child-sharing schedule; and (2) the court erred in admitting and considering the report

submitted by the children's attorney, because it contained hearsay statements by the children and improper analysis by the attorney. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Scott and Patricia (together the parents) were married in 1997. The two minor children of their marriage are an 11-year-old son and a 9-year-old daughter. The parents separated in March 2003.

A. Original Child Custody Order

Following a two-day trial in late 2004 on child custody and visitation issues, the court² rendered a final determination on those issues within the meaning of *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*) (discussed, *post*). In its findings and order after hearing (the original custody order), the court ordered that the parents "shall have the joint legal care, custody and control" of the children, and awarded to Patricia "primary physical custody" of the children. The court awarded to Scott "visitation with the minor children on alternate weekends from Friday after school to Monday morning," plus "alternate midweek visitation with the minor children as follows: [¶] "a. During the week prior to [Patricia's] weekend with the children, he shall have the children from Wednesday after school to Friday morning return to school[;] [¶] b. During the week after [Patricia's] visitation with the minor children, he shall have the children from

² The Honorable H. Ronald Domnitz.

Sunday at 10:00 a.m. through Tuesday morning return to school."³ The original custody order stated that "[i]n the event either party wishes to modify the child custody, visitation or sharing provisions stated herein, that party shall be required to demonstrate a *significant change of circumstances* justifying such a modification." (Italics added.)

In addition, the court ordered the parents and the children to continue in therapy with their respective therapists. It also ordered the parents to participate in both nonbinding mediation regarding "any future child custody/visitation issues," and high conflict intervention. The court prohibited, "without prejudice," the children from having contact with Scott's mother and father (the children's grandparents) or with his sister (the children's aunt).

B. Scott's First Order to Show Cause (OSC) Request To Modify the Original Child Custody Order

In late 2006 Scott made an OSC request to modify the original child custody order. In its findings and order after hearing, the court⁴ found that it had previously determined that son was highly allergic to cat dander and had addressed the issue of

³ In its April 30, 2008 report, Family Court Services of the Superior Court of San Diego County (FCS) summarized the parties' understanding of this confusing visitation schedule: "Both parents report they have been following the court ordered parenting plan for the past 3 1/2 years. The father described that as: [T]he children reside primarily in [Patricia's] care and [he] parents the children 2 1/2 weekends per month and a few weekdays. The mother described the parenting plan as: [¶] Week 1 children with [her] Friday through Friday [¶] Week 2 children with [her] Monday through Sunday [¶] Week 3 children with [her] Tuesday through Friday [¶] Week 4 children with [her] Wednesday through Friday."

⁴ Judge Domnitz.

whether the children's grandparents could retain their 13 cats and have visitation with their grandson "if they first showered, shampooed and changed their clothing and then saw him away from their home." The court denied Scott's request to allow son to visit with his grandparents, finding that Scott had not shown a change of circumstances.

Noting, however, that it had "no recollection of the basis for denying visitation between the [children's grandparents] and [daughter] two years ago," the court modified the previous order by permitting her to visit with the children's grandparents and aunt "without any restrictions regarding their showering, shampooing and changing their clothing before they see her," but ordered that she "may not come within 100 yards of [their] house or their environment, or within 10 yards of their vehicle, so that she does not pick up cat dander."

C. Scott's Second OSC Request To Modify the Child Custody Order

In September 2007 the court⁵ entered a stipulated judgment of dissolution. In November of that year, Scott brought his second OSC request to modify the child custody order which is the subject of this appeal. Scott requested that joint legal custody be continued, but that he be granted sole physical custody of the children and that Patricia be given visitation rights.

In his supporting declaration, Scott accused Patricia of "ag[g]ressively alienating the children from [him]." He stated that daughter ran away earlier in the year "because she was pressured by [Patricia] for visiting with [Scott's] mother and [his] sister," and

⁵ The Honorable David B. Oberholtzer.

daughter's therapist was "having trouble with [Patricia] as she [was] continuing to alienate the children from [Scott]." Scott also stated that son had refused to go with Scott for visitation the previous Sunday, son had stopped talking to Scott on the telephone, and Patricia was "attempting to create an allergy situation" by asserting that son was having allergic reactions caused by his being with Scott. Scott requested that the children's attorney contact the children's therapists and make "appropriate recom[m]endations to the court as [the] children [were] suffering."

1. *Patricia's responsive declaration*

Patricia submitted her own responsive declaration, stating that son had been tested for allergies, revealing that he was severely allergic to cat dander. She accused Scott of minimizing son's allergy symptoms and neglecting to care for son when he was very sick. Patricia stated that son had asked to go to the emergency room, but Scott chose to go to a pharmacy and, without consulting a doctor, gave him Benadryl upon the pharmacist's advice. The following week Patricia took son to an appointment with his allergist, who diagnosed him with a sinus infection resulting from bad allergies. She complained that the children's grandparents have 13 cats. Son will get sick if a person has cat dander on his clothes or skin, even if cats are not present. He has an allergic reaction to daughter every time she goes to their grandparents' house and returns to Scott's house. Patricia also complained that Scott's "solution is to heavily medicate [son]." He often does not spend time with the children during his scheduled visitations, "exhibits a temper when he does not get his way," and threatens to take away the children's privileges "if they do not converse on the telephone with their grandparent[s] for lengthy periods of time." He

"harass[ed]" her about the Thanksgiving vacation and when son refused to go with Scott, Scott became angry, son became very upset, and, when she told Scott it was best for him to leave, Scott threatened to call the police.

2. FCS mediation report

Pending the hearing on Scott's OSC request, he and Patricia attended a mediation conference at the office of the FCS. In her 11-page report, which she submitted to the court, the FCS mediator discussed the parties' allegations and responses and her conversation with daughter's therapist, who reported that after daughter indicated she did not want to see her grandparents, she stated she *did* want to see them but did not want to make her mother mad. The mediator also stated in the FCS report that she spoke with (1) one of daughter's teachers, who said daughter had made huge gains academically and socially; (2) the children's special education teacher, who reported that the children's skill levels had increased, as had their self-esteem and motivation; and (3) the children's counsel, Margo Lewis. The FCS report acknowledged the existence of a "tremendous amount of apparently enduring conflict," but recommended that the parents continue to share joint legal custody and maintain the current parenting schedule.

3. Report of the children's attorney (Lewis's report)

Lewis, the children's attorney, submitted a 13-page report to the court, indicating she had met with the children and their parents; reviewed the parties' pleadings, including the psychological evaluation prepared by Dr. Steven Sparta; spoken by telephone with the parents' and children's therapists, Scott's father, and the FCS mediator; and reviewed medical reports regarding son's health. Lewis noted in her report that the current child-

sharing plan was "extremely confusing", and "there [was] no doubt" the children were "hav[ing] difficulty keeping track" of it. She expressed her "strong reservations about disclosing anything that the children [had] said during the meetings because there is concern that it will be raised with them by [Patricia] at home."

Based on her meeting with son, Lewis did report that he attempted to be "protective of [Patricia] against [Scott] during the meeting." Son was concerned that daughter likes their father and thought daughter should not like him. Lewis also reported, based on her meeting with daughter, that daughter believed she was being required to choose between her grandparents and her mother, and there was no way for her to openly love her father, grandparents and aunt without making her mother angry.

Regarding Scott's claim of alienation, Lewis stated in paragraph 41 of her report that she had reviewed Dr. Sparta's report, which indicated that this problem had been "ongoing" for at least four to five years, and Dr. Sparta had "cautioned the court about the possibility of future pressures and influences by [Patricia] that could cause disruption to the relationship between [Scott] and the children." Noting that "[t]his case does not appear to be a case of alienation in the classic sense" and that Patricia "is a loving parent [who] has many things to provide to the children," Lewis stated that Patricia's "ongoing behavior by including the children in the adult issues of this case [was] having the same net effect," and the children were "unable to enjoy their time with [Scott] because they fear[ed] that [Patricia] will be angry or that they are disloyal."

Lewis recommended that the parents continue to share joint legal custody of the children. However, she also recommended that the parents have joint physical custody

and that the child-sharing plan be modified as follows: "a. The children shall be with [Patricia] each Monday after school or 9:00 a.m. if [there is] no school[,] until [they] return to school on Wednesday morning or 9:00 a.m. if [there is] no school. [¶] b. The children shall be with [Scott] each Wednesday after school or 9:00 a.m. if [there is] no school[,] until [they] return to school on Friday morning or 9:00 a.m. if [there is] no school. [¶] c. On alternating weekends between the parents from Friday after school or 9:00 a.m. if [there is] no school[,] until Monday morning return to school or 9:00 a.m. if [there is] no school."

Lewis also recommended that Scott be permitted to allow son to visit the children's grandparents and aunt during Scott's parenting time under specified conditions, including that the grandparents and aunt shower immediately before each visit and wear freshly laundered clothing that had not come in contact with the cats and that the visits take place somewhere other than the grandparents' residence or any other place where cats live or are present. Furthermore, Lewis recommended that Scott be permitted to allow daughter to visit the grandparents and aunt during Scott's parenting time, provided he makes sure that daughter changes her clothing and showers after any such visitation or before coming in contact with son.

In addition, Lewis recommended a series of restrictions on the parents' behavior toward the children, such as that "[n]either parent shall provide the minor children with information regarding the court proceedings or share adult information with [them], including but not limited to information regarding finances and health insurance" and that "[n]either parent shall disparage the other parent or the significant other of the parent in

the presence of the minor children and shall insure that all third parties comply with this recommendation."

4. *Hearing*

At the hearing on Scott's OSC request, the court⁶ indicated it had read and considered the parties' pleadings, the FCS report, and Lewis's report. Following oral arguments by the parents' attorneys and the children's attorney, the court recognized that the children were doing well in school under the current child-sharing order, but found that, as was indicated in Lewis's report, Patricia's conduct was "alienating as it pertained to the [children] toward [Scott]" and such continuing conduct by Patricia was both "the real problem" and "a major change in circumstances" that warranted a modification of the custody and visitation orders in this case.

Patricia's counsel objected, claiming Scott had not met his burden of showing a significant change in circumstances because Lewis's report was based on inadmissible hearsay "coming from the children."

In response, referring to paragraph 41 of Lewis's report, the court stated that Dr. Sparta "was involved in this case a long time ago," he "put everybody on notice" about this situation, and now, four or five years later with the same custody and visitation schedule and recommendations regarding therapy, the situation "hasn't been rectified" and "[w]e're in the exact same place as we were four or five years ago." Noting that Lewis's report showed that the children were not fearful of Scott and that Lewis found no

⁶ The Honorable Edward P. Allard III.

evidence that Scott was abusive toward the children, the court repeated its finding that there was a substantial change of circumstances in this case and indicated it could modify the existing custody and visitation orders.

5. January 14 order

On January 14, 2009, the court issued its written findings and order (the January 14 order), finding that "[t]here had been a change in circumstances" and adopting the recommendations set forth in Lewis's report by ordering (1) that the parents continue to have joint legal custody of the children, (2) that the parents have joint physical custody of the children, and (3) that the child-sharing plan be modified so that (a) the children be with Patricia each Monday after school (or after 9:00 a.m. if there is no school) until they return to school on Wednesday morning (or 9:00 a.m. if there is no school), (b) the children be with Scott each Wednesday after school (or 9:00 a.m. if there is no school) until they return to school on Friday morning (or 9:00 a.m. if there is no school), and (c) they be with each parent on alternating weekends from Friday after school (or 9:00 a.m. if there is no school) until they return to school on Monday morning (or 9:00 a.m. if there is no school).

The January 14 order also adopted Lewis's recommendations regarding the children's visitation with their grandparents and aunt and restrictions on the parents' behavior toward the children (discussed, *ante*). Patricia's appeal followed.

DISCUSSION

I. *SUBSTANTIAL CHANGE IN CIRCUMSTANCES*

In challenging the January 14 order, Patricia contends there is no evidence of a substantial change in circumstances because any lack of progress on her part in altering her behavior, which Scott claimed involved alienating the children from him, was not a change of circumstances, as shown by the fact that the court "did not condition" the original child custody order "on any particular change of behavior of the parties." She also contends "[t]here clearly was no change in circumstances with respect to the orders concerning [Timothy's] allergies to cat dander" or with respect to the child-sharing schedule. These contentions are unavailing.

A. *Applicable Legal Principles*

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.' [Citation.]" (*Montenegro, supra*, 26 Cal.4th at p. 255.) Under this test, we determine whether the trial court could have reasonably found the order in question advanced the "best interest[s]" of the child. (*In re Marriage of Burgess* (1996) 13 Cal. 4th 25, 32 (*Burgess*).) "[W]e must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked.' [Citation.]" (*Montenegro*, at p. 255.)

In the absence of a final judicial custody determination, "[t]he court and the family have 'the widest discretion to choose a parenting plan that is in the best interest[s] of the child.' [Citation.]" (*Montenegro, supra*, 26 Cal.4th at p. 255, fn. omitted.)

If, however, there has been a final judicial custody determination, as occurred here, the parent "seeking to alter the order for *legal and physical custody* can do so only on a showing that there has been a *substantial change of circumstances* so affecting the minor child that modification is essential to the child's welfare." (*Burgess, supra*, 13 Cal.4th at p. 37, italics added; *Montenegro, supra*, 26 Cal.4th at p. 256.) This judicially created changed circumstance rule "fosters the dual goals of judicial economy and protecting stable custody arrangements." (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535; *Montenegro*, at p. 256.)

The changed circumstance rule does not apply when a parent requests only a modification of the parenting or visitation schedule. (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1077.)

B. *Analysis*

Here, as she did during the hearing on Scott's OSC request to modify the child custody orders, Patricia claims Scott failed to meet his burden of showing a substantial change in circumstances. This claim is unavailing because the record establishes that the changed circumstance rule was not triggered in this case, and thus we need not reach the issue of whether Patricia's alleged failure to alter her behavior of alienating the children from Scott was a substantial change of circumstances, as Scott maintains.

As discussed, *ante*, the judicially created changed circumstance rule applies only when a parent seeks to alter a final order for *legal or physical custody*. (*Montenegro, supra*, 26 Cal.4th at p. 256; *Burgess, supra*, 13 Cal.4th at p. 37.) In *Montenegro*, the California Supreme Court explained that "once it has been established that a particular

custodial arrangement is in the best interests of the child, the [trial] court need not reexamine that question. Instead, [under the changed circumstance rule,] it should preserve the established *mode of custody* unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest." (*Montenegro*, *supra*, 26 Cal.4th at p. 256, italics added.)

Here, it is undisputed that the original custody order granted the parents joint legal custody of the children and awarded "primary physical custody" of the children to Patricia. In his request for modification of the final custody order, Scott did not challenge the grant of joint legal custody. His only request for modification of the established "mode of custody" was his request that he be granted sole physical custody of the children. The court, however, denied that request. Instead, it followed the recommendation of the children's attorney and ordered that the parents "shall have *joint physical custody* of the minor children." (Italics added.)

By granting the parents joint physical custody of the children, the court did *not* modify the established mode of custody within the meaning of *Montenegro*, *supra*, 26 Cal.4th 249, and thus did not trigger the changed circumstance rule. Although the original custody order awarded primary physical custody of the children to Patricia, the January 14 order granting the parents joint physical custody of the children did not modify the established mode of *physical* custody. The California Supreme Court has explained that "[t]he provisions in the Family Code governing custody of children do not use the term 'primary physical custody.'" (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1081, fn. 1, citing *In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 945,

fn. 2.) The high court in *LaMusga* also explained that "the code uses the terms 'joint physical custody,' which 'means that each of the parents shall have significant periods of physical custody' (Fam.Code, § 3004), [7] and 'sole physical custody,' which 'means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation' (Fam.Code, § 3007)." (*LaMusga, supra*, 32 Cal.4th at p. 1081, fn. 1.) In *Richardson*, the Court of Appeal explained that, although it is frequently employed, the term "primary physical custody" has "no legal meaning." (*Richardson, supra*, 102 Cal.App.4th at p. 945, fn. 2.) The *Richardson* court also explained that under the Family Code, a parent may be awarded joint physical custody or sole physical custody. (*Ibid.*; see Fam. Code, §§ 3004 & 3007 & Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶¶ 7:302 & 7:306, pp. 7-107 to 7-109 (rev. #1 2006).)

Applying the foregoing authorities to the facts of this case, we conclude that the original custody order, in granting primary physical custody of the children to Patricia, in effect awarded joint physical custody of the children to the parents. With respect to the issue of physical custody, under the foregoing Family Code sections and decisional authorities the original custody order could award only sole physical custody to one of the parents or joint physical custody. It is undisputed that the original custody order did not award sole physical custody to either of the parents. Furthermore, each of the parents

⁷ Family Code section 3004 provides: "'Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents, subject to Sections 3011 and 3020."

had significant periods of physical custody under the child sharing provisions of that order. Thus, in granting joint physical custody of the children to the parents, the challenged January 14 order did not modify the established "mode of [physical] custody" within the meaning of *Montenegro, supra*, 26 Cal.4th 249, and thus did not trigger the changed circumstance rule. Because that rule was not triggered, any claim by Patricia that the joint physical custody provision of the January 14 order must be reversed on the ground Scott has failed to show a substantial change of circumstance is unavailing.

Patricia's related claims that other provisions of the January 14 order that do not pertain to legal or physical custody—such as those relating to the children's visitation with their grandparents and aunt, and the child sharing schedule⁸—should be reversed on the same ground that Scott has failed to show a substantial change of circumstance, are also unavailing. As already discussed, the changed circumstance rule applies only to changes

⁸ Patricia does not explicitly challenge the provisions of the January 14 order restricting the parents' behavior toward the children, such as the provision recommended in the Lewis report (discussed, *ante*) that "[n]either parent shall disparage the other parent or the significant other of the parent in the presence of the minor children and shall insure that all third parties comply with this recommendation."

in a final *custody* determination.⁹ (*Montenegro, supra*, 26 Cal.4th at p. 256; *Burgess, supra*, 13 Cal.4th at p. 37; *In re Marriage of Lucio, supra*, 161 Cal.App.4th at p. 1077.)

II. LEWIS'S REPORT

In seeking reversal of the January 14 order, Patricia also contends the court erred in admitting and considering the report submitted by the children's attorney, Lewis. She maintains it contained hearsay statements by the children and improper analysis by Lewis. In attacking the contents of the Lewis report on these grounds, Patricia is seeking to persuade this court that "there is no evidence to support [the court's] finding that there was a change of circumstances." She concludes her appellant's opening brief with the assertion that "[t]here was no change of circumstances."

These contentions are unavailing. For reasons discussed, *ante*, the change of circumstance rule was never triggered in this case because Scott did not seek a modification of the court's final custody determination, and thus it is immaterial whether there is evidence to support the court's finding that Scott had shown a substantial change of circumstance. Patricia's claim that the January 14 order must be reversed on the ground that there is no evidence of a substantial change of circumstance therefore fails.

⁹ The original custody order provided that, "[i]n the event either party wishes to modify the child custody, *visitation or sharing provisions* stated herein, that party shall be required to demonstrate a *significant change of circumstances* justifying such a modification." (Italics added.) This provision is contrary to decisional law, and thus unenforceable, to the extent it purports to require one of the parents to show a significant change of circumstance in order to prevail on a request to modify the "[child] visitation or sharing provisions" of that order or any other noncustodial provisions. (See *Montenegro, supra*, 26 Cal.4th at p. 256; *Burgess, supra*, 13 Cal.4th at p. 37; *In re Marriage of Lucio, supra*, 161 Cal.App.4th at p. 1077.)

She has not shown the challenged provisions of the January 14 order are not in the best interests of the children.

DISPOSITION

The order is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.